No. 89-204

AUG 2 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

E. R. SQUIBB & SONS, INC.,

Petitioner,

-against-

MINDY HYMOWITZ and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

E. R. SQUIBB & SONS, INC.,

Petitioner,

-against-

ELIZABETH TIGUE, et al.,

Respondents.

E. R. SQUIBB & SONS, INC.,

Petitioner,

-against-

JANE DOLAN and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Whether a state court violates due process by allowing the award of tort damages against a defendant that concededly could not have caused injury to the plaintiff or where there is concededly no "reasonable link between liability and the risk created by [the] defendant to a particular plaintiff."

2. Whether a state statute reviving previously time-barred tort claims—arising from use of only five arbitrarily selected products—deprives defendants of property without due process of law or violates the Equal Protection Clause.

LIST OF PARTIES

The decision below involved four separate appeals which were consolidated for argument and decision by the New York Court of Appeals. Three of those four appeals are the subject of this petition. The parties involved in the three cases before this Court are as follows:

Hymowitz v. Eli Lilly & Co.

Plaintiff	Mindy Hymowitz
Intervenor	Attorney General of the State of New York
Defendants-appellants in court of appeals	Eli Lilly & Co.; Abbott Laboratories; The Upjohn Co.; Merck & Co.; E.R. Squibb & Sons, Inc.*
Defendants	Ayerst Laboratories (a division of American Home Products Corp.); Winthrop Laboratories (a division of Sterling Drug, Inc.)

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* Petitioner E. R. Squibb & Sons, Inc. is a wholly-owned subsidiary of Squibb Corporation. The affiliates and subsidiaries (other than wholly-owned subsidiaries) of Squibb Corporation are Squibb-Marsam, Inc.; Squibb-Novo, Inc.; Chesapeake Biological Laboratories, Inc.; Medaphis Corporation; Squibb of Bangladesh, Ltd.; Squibb Industria Quimica, S.A.; P.T. Squibb Indonesia; Squibb Korea Limited; Squibb Pakistan Ltd; Von Heyden Gesellschaft Mit Beschrankter Haftung; Manufactureros Quimicos Farmaceuticos S.A.; Synbiotics Limited; R.C.S. Realty Corporation; Sino-American Shanghai Squibb Pharmaceuticals, Inc.; and Squibb (Nigeria) Limited.

On July 26, 1989, Squibb Corporation, Bristol-Myers Company and Screen Co., a wholly-owned subsidiary of Bristol-Meyers, executed an agreement and plan of merger which provides, among other things, that upon consummation of the merger, Squibb Corporation will become a wholly-owned subsidiary of Bristol-Myers.

Tigue v. E.R. Squibb & Sons, Inc.

Plaintiffs	Elizabeth Tigue; Barbara Tigue; and Sayre Margolies (as Administratrix of the Estate of Myrna Margolies)
Defendants-appellants in court of appeals	E. R. Squibb & Sons, Inc.; Abbott Laboratories; Merck, Sharpe & Dohme (a division of Merck & Co.); Rexall Drug Co.; The Upjohn Co.; William H. Rorer, Inc.; Boyle & Co. Pharmaceuticals
Defendants	Amfre-Grant, Inc. (a subsidiary of Ormont Drug & Chemical Co.); Carnrick Laboratories (a division of G.W. Carnrick Co.); Cole Pharmaceutical Co.; Kremers-Urban Co.; Jerome Schneider, M.D.

Dolan v. Eli Lilly & Co.

Plaintiff	Jane Dolan
Intervenor	Attorney General of the State of New York
Defendants-appellants in court of appeals	Eli Lilly & Co.; E.R. Squibb & Sons, Inc.; The Upjohn Co.
Defendant	Winthrop-Breon Laboratories

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E. R. Squibb & Sons, Inc., respectfully prays that a writ of certiorari issue to review the judgments and opinion of the New York Court of Appeals entered on April 4, 1989.

OPINIONS BELOW

The opinion of the New York Court of Appeals in four cases (of which three are appealed here), consolidated for argument and decision as *Hymowitz v. Eli Lilly & Co.*, is reported at 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069 (1989), and is reprinted in the Appendix at 1a-34a.[1] The opinions of the lower courts in two of the cases are reported as *Hymowitz v. Eli Lilly & Co.*, 136 Misc.2d 482, 518 N.Y.S.2d 996 (Sup. Ct. N.Y. Co. 1987) (App. 44a-54a), *aff'd*, 139 A.D.2d 437, 526 N.Y.S.2d 922 (1st Dep't 1988) (App. 35a-36a); and *Tigue v. E.R. Squibb & Sons, Inc.*, 136 Misc.2d 467, 518 N.Y.S.2d 891 (Sup. Ct. N.Y. Co. 1987) (App. 55a-65a), *aff'd*, 139 A.D.2d 431, 526 N.Y.S.2d 825 (1st Dep't 1988) (App. 37a-41a). The unreported decision of the Supreme Court, New York County, in *Dolan v. Eli Lilly & Co.* is reproduced at App. 66a-73a; its affirmance is reported at 139 A.D.2d 978, 527 N.Y.S.2d 331 (1st Dep't 1988) (App. 42a-43a).

JURISDICTION

The judgments of the New York Court of Appeals effectively rejecting petitioner's federal constitutional claims were entered on April 4, 1989. No rehearing was sought. By order dated June 23, 1989, Justice Marshall extended Squibb's time to petition for certiorari to and including August 2, 1989. This Court has certiorari jurisdiction under 28 U.S.C. § 1257(a).

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1 In this petition, all parenthetical references to a number followed by the letter "a" (*e.g.*, "3a," "27a") refer to pages of the separately bound Appendix to the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 4 of chapter 682, Act of July 30, 1986, 1986 New York Laws 1567, provides in pertinent part:

> "Notwithstanding any other provision of law, . . . every action for personal injury . . . or death caused by the latent effects of exposure to diethylstilbestrol, tungsten-carbide, asbestos, chlordane or polyvinyl-chloride upon or within the body . . . which is barred as of the effective date of this act or which was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired is hereby revived and an action thereon may be commenced provided such action is commenced within one year from the effective date of this act . . . ."

INTRODUCTION

At issue in this case is whether a state court can radically and retroactively expand common law tort liability by eliminating the fundamental requirement of individualized assessment of a defendant's liability. Under the rule adopted by the court below, a plaintiff can now take petitioner Squibb's property through judicial process even though the likelihood is concededly "very remote" that Squibb actually injured the plaintiff (App. 9a).

Squibb's responsibility is presumed upon mere proof that it belongs to an industry of some 200-300 members, of which one member allegedly may have injured the plaintiff. As the court below acknowledged, this rule of "non-identification" liability permits damage awards absent any "*reasonable link* between liability and the risk created by a defendant to a particular plaintiff" (App. 17a; emphasis added).

Indeed, by making liability turn on the creation of risk "to the public at large" (*id.*), the court below has allowed a plaintiff to exact damages even from a defendant that conclusively proves its product was not the source of plaintiff's alleged injuries (*id.*). This "non-exculpation" rule allows a finding of liability even when the evidence conclusively demonstrates innocence.

The attraction of taxing a deep-pocket defendant to pay for an allegedly serious injury is clear. But judicial imposition of collective guilt, with no opportunity for individual exculpation, raises profound constitutional questions.

The impact of New York's judge-made rule of non-identification, non-exculpation liability is compounded here by a discriminatory new statute of limitations. Substantial due process and equal protection questions are raised by the so-called "revival" statute, which singled out petitioner's product as one of five substances as to which stale claims—including claims known to the plaintiffs during the old limitations period—were revived.

STATEMENT OF THE CASE

A. *DES and the Litigation of DES Claims.*

Over the past two decades, lawsuits alleging injury from the drug diethylstilbestrol, or DES, have been brought throughout the country. Plaintiffs claim that they were exposed to DES when their mothers allegedly took the drug to prevent miscarriage of the pregnancies that culminated in plaintiffs' births. Plaintiffs' injuries allegedly do not appear until many years later. As a result, most plaintiffs cannot prove which of several hundred potential defendants produced the DES their mothers allegedly took.

DES duplicates the physiological effects of estrogens, the natural female sex hormones, which are essential to fertility and successful pregnancy. DES was first synthesized by British researchers in the late 1930's. Compared to natural estrogens, DES is inexpensive and easy to produce. Instead

of requiring often painful injections, it is effective when taken orally. DES "was accordingly regarded as a revolutionary breakthrough in biomedical science." *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 420 (D.C. Cir. 1988). It made "estrogen therapy available for the first time to all women." *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1009 (D.S.C. 1982).

The U. S. Food & Drug Administration ("FDA") first approved DES as safe for use in treating certain non-pregnancy related conditions in 1941. *See Tidler*, 851 F.2d at 420; *Ryan*, 514 F. Supp. at 1009-10; *Martin v. Abbott Laboratories*, 102 Wash.2d 581, 689 P.2d 368, 374 (1984). It is still "in use today with full approval of the FDA and the Surgeon General" for treatment of those conditions, *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, 406 A.2d 185, 189-90 (1979), and others including some breast and prostate cancers. *See* 36 Fed. Reg. 21538 (1971).

In 1947, the FDA approved use of DES in treating certain endocrine-produced disturbances of pregnancy, including spontaneous abortions or miscarriages. By the early 1950's, the FDA had concluded that DES was "generally recognized . . . as safe" for pregnancy use, *Ryan*, 514 F. Supp. at 1011 & n.3, as had been confirmed by independent researchers in the field.

DES was widely recommended by medical experts and prescribed by doctors for preventing miscarriages. Some 200-300 suppliers ultimately distributed products that contained generic DES as the active ingredient. *See Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 243 (Mo. 1984). It was taken by an estimated 1.5-3 million pregnant women during the period 1947-1971. *See Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, 927, *cert. denied*, 449 U.S. 912 (1980).

In none of the extensive clinical studies leading to the approval of DES (nor in any studies during over 20 years of use thereafter) was there evidence of danger to the mother or fetus. Indeed, during normal pregnancy the fetus is exposed to estrogen levels hundreds of times greater than those in

non-pregnant women. In 1971, however, Dr. Arthur Herbst published an article which purported to show a statistical association between a form of vaginal cancer in young women and prenatal exposure to DES.[2] Shortly thereafter, the FDA barred use of DES during pregnancy. *See, e.g., Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164, 169, *cert. denied*, 469 U.S. 833 (1984); *Lyons*, 406 A.2d at 189. Herbst's article has been cited literally hundreds of times since 1971. Yet not a single subsequent controlled epidemiologic study has verified Herbst's claims nor causally linked DES to vaginal cancer or other serious abnormalities.

Although the Herbst article is the essential basis for claims that prenatal DES exposure causes cancer, Herbst's raw statistical data have never been made available for scientific peer review and criticism or subjected to cross-examination in court. *See Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 560, 563 (7th Cir. 1984). More recent studies question the validity of Herbst's purported statistical associations and suggest that prenatal DES exposure does not cause the alarming increases in cancer claimed by plaintiffs.[3] Most significantly, *all* the reproductive ailments claimed by plaintiffs to be caused by DES can and do occur in women who were never exposed to the drug. *See, e.g.*, n. 3 above; *Burnside v. Abbott Laboratories*, 351 Pa.Super. 264, 505 A.2d 973, 988 (1985).

In response to the inability of DES plaintiffs to identify the supplier of the drug that allegedly injured them, the lower courts have reached widely divergent and often conflicting results. The fundamental importance of individualized

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2 Herbst, *et al.*, *Adenocarcinoma of the Vagina—Association of Maternal Stilbestrol Therapy with Tumor Appearance in Young Women*, 284 New Eng. J. Med. 878 (1971).

3 *See, e.g.*, McFarlane, *et al.*, *Diethylstilbestrol and Clear Cell Vaginal Carcinoma*, 81 Am. J. Med. 855 (1986); Mantel, "Some Problems With Investigations and Epidemiologic Studies Relating to Pregnancy," in *Prevention of Physical and Mental Congenital Defects*, pp. 45-48 (Marois ed. 1985).

factfinding has led most courts to dismiss cases where plaintiffs cannot identify the proper defendant.[4] Several states have adopted non-identification liability, but in forms that differ substantially from each other.[5] Still others have left the question open.[6] All states but New York, however, permit defen-

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4 *See, e.g., Tidler v. Eli Lilly & Co.*, 851 F.2d 418 (D.C. Cir. 1988); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984); *Burnside v. Abbott Laboratories*, 351 Pa. Super. 264, 505 A.2d 973 (1985); *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 427 A.2d 1121 (1981); *Morton v. Abbott Laboratories*, 538 F. Supp. 593 (M.D. Fla. 1982); *Mizell v. Eli Lilly & Co.*, 526 F. Supp. 589 (D.S.C. 1981); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981); *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978).

In addition, a number of courts have rejected non-identification liability in cases involving other products. *See, e.g., Shackil v. Lederle Laboratories,* A.2d , No. A/16/17/18 (N.J. July 31, 1989); *Goldman v. Johns-Manville Sales Corp.*, 33 Ohio St.3d 40, 514 N.E.2d 691 (1987); *In re Asbestos Litigation*, 509 A.2d 1116 (Del. Super. 1986), *aff'd*, 525 A.2d 146 (Del. 1987); *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480 (11th Cir. 1985) (Georgia law); *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581 (5th Cir. 1983) (Louisiana law), *cert. denied*, 465 U.S. 1102 (1984); *Dawson v. Bristol Laboratories*, 658 F. Supp. 1036 (W.D.Ky. 1987); *Griffin v. Tenneco Resins, Inc.*, 648 F. Supp. 964 (W.D.N.C. 1986). *Cf. Senn v. Merrell-Dow Pharmaceuticals, Inc.*, 305 Or. 256, 751 P.2d 215 (1988) (rejecting "market share alternative liability").

5 Under the leading *Sindell* decision in California, *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, *cert. denied*, 449 U.S. 912 (1980), a plaintiff must sue a "substantial percentage" of DES producers, based on national market share figures, and each defendant's share of liability is limited to its market share. *Id.* at 937. *See Brown v. Superior Court*, 44 Cal.3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470 (1988). Michigan requires a plaintiff to bring "*all* possible defendants into court", thereafter subjecting them to joint and several liability. *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164, 173-74, *cert. denied*, 469 U.S. 833 (1984) (emphasis added). In other states, non-identification actions may proceed against only a single DES producer, and defendants' liability can be "inflated" above market share according to differing rules. *See Collins v. Eli Lilly & Co.*, 116 Wis.2d 166, 342 N.W.2d 37, *cert. denied*, 469 U.S. 826 (1984); *Martin v. Abbott Laboratories*, 102 Wash.2d 581, 689 P.2d 368 (1984); *Smith v. Eli Lilly & Co.*, 173 Ill. App.3d 1, 527 N.E.2d 333 (1988).

6 *See, e.g., Gaulding v. Celotex Corp.*, 772 S.W.2d 66 (Tex. 1989); *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209 (Minn. 1985); *Payton v. Abbott Laboratories*, 386 Mass. 540, 437 N.E.2d 171 (1982).

dants in non-identification actions to introduce evidence to exculpate themselves. Individual DES defendants, including Squibb, have in fact proven repeatedly that they could not have been responsible for particular plaintiffs' injuries.[7]

In DES cases that have gone to trial, plaintiffs' speculative causation claims have generally failed to impress juries that have seen their lack of persuasive scientific evidence. One Connecticut jury, for example, that heard four months of testimony—including numerous medical experts presented by skilled plaintiffs' counsel—took just two hours to return a special verdict finding that DES did not cause plaintiff's injuries.[8] Though individual verdicts do not preclude claims by other plaintiffs, the fact that all plaintiffs' scientific evidence of causation is largely identical, combined with juries' rejection of that evidence, indicates that defendants are not the "wrongdoers" assumed by the court below.

B. *The New York "Revival" Statute.*

Two of the cases on appeal here would have been barred by the New York statute of limitations were it not for the passage of a special "revival" statute by the legislature. *See* Act of July 30, 1986, ch. 682 § 4, 1986 N.Y. Laws 1567 (p. 2 above). That statute singled out DES, along with four other substances,[9] from a multitude of products believed to cause latent injury. The statute revived claims based on "the latent effects of exposure" that were otherwise barred by, or had been dismissed because of, the statute of limitations.[10]

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7 *See, e.g., Martin*, 689 P.2d at 372 (summary judgment exculpating Squibb); *Burnside*, 505 A.2d at 986.

8 *Miller v. Eli Lilly & Co., et al.*, No. CV-80-0047107S (Conn. Super. Ct. Feb. 13, 1985). *See also, e.g., Flax v. E.R. Squibb & Sons, Inc.*, No. 4174 (Pa.Ct. of Common Pleas (Philadelphia) Sept. 30, 1988) (special verdict that DES did not cause plaintiff's injuries after one-month trial).

9 The other substances were asbestos, polyvinylchloride (PVC), tungsten carbide and chlordane.

10 The same legislation also changed the New York rule that the three-year statute of limitations for personal injury actions, *see* N.Y. Civ. Prac.

C. *The Proceedings Below and Presentation of Federal Questions.*

The three cases that are the subject of this petition were separately briefed in the court of appeals and then consolidated with a fourth action (not appealed from here) for argument and decision. The cases had been certified for appeal by the appellate division. The three cases here at issue are as follows:

1. *The Tigue Action.*

Plaintiffs Elizabeth Tigue, Barbara Tigue and Sayre Margolies filed suit in 1976, individually and as representatives of a class that was never certified. Elizabeth Tigue alleged that as a result of her mother's ingestion of DES, she suffered from adenosis, a benign tissue condition also found in non-DES exposed women. Sayre Margolies, as administratrix of the estate of her daughter Myrna, asserted a claim for wrongful death, alleging that DES she took caused her daughter to develop cancer. Plaintiffs alleged that they could not identify the actual manufacturer of the DES allegedly ingested, and that they therefore would rely upon some theory of "non-identification" liability.[11]

A number of defendants, including Squibb (App. 74a), moved for summary judgment on the grounds that plaintiffs had failed to identify them as the manufacturer of the DES in question, and that any form of non-identification liability was unconstitutional. Certain defendants further affirmatively demonstrated that they did not supply the DES actually taken.[12]

L. & R. § 214(5) (McKinney Supp. 1989), began to run when a plaintiff was last exposed to an allegedly harmful substance. *See Fleishman v. Eli Lilly & Co.*, 62 N.Y.2d 888, 478 N.Y.S.2d 853, 467 N.E.2d 517 (1984), *cert. denied*, 469 U.S. 1192 (1985). Under the new law, the limitations period is measured from the date of discovery of the injury. *See* N.Y. Civ. Prac. L. & R. § 214-c, (McKinney Supp. 1989), codifying 1986 N.Y. Laws, ch. 682 § 2.

11 The revival statute is not implicated in the *Tigue* action.

12 Defendant Upjohn showed that the form of DES that it manufactured (a soft gelatinous capsule) was completely inconsistent with the physical

The trial court denied the motions for summary judgment in a published opinion rejecting defendants' constitutional challenges (App. 55a-65a). Although the Appellate Division and the Court of Appeals did not address the constitutional claims, they were presented in defendants' briefs to each court (App. 81a-94a).

2. *The Hymowitz Action.*

Plaintiff Mindy Hymowitz alleged that her action was authorized by the 1986 revival statute. Squibb raised a statute of limitations defense, asserting that the revival provision violated the Due Process and Equal Protection Clauses. The trial court granted plaintiff's motion to strike the limitations defense (App. 44a-54a). The constitutional claims challenging the revival statute were raised in both appellate courts and rejected by them (App. 19a-22a, 35a-36a, 44a-54a).

3. *The Dolan Action.*

Plaintiff Jane Dolan alleged that she was unable to identify the manufacturer of the DES ingested by her mother and that her action was timely by virtue of the revival statute. Squibb and other defendants moved for summary judgment, on the grounds that the revival statute was unconstitutional and that plaintiff had failed to identify the manufacturer of the DES ingested by her mother.

The trial judge denied defendants' motions in an unpublished memorandum decision, relying on his earlier opinions in *Hymowitz* and *Tigue* (App. 66a-73a). Constitutional claims identical to those raised in the *Tigue* and *Hymowitz* actions were raised in the appellate courts (App. 87a-94a). The constitutional challenges to non-identification liability were not discussed by those courts; the

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characteristics of the hard tablets described by Mrs. Margolies and Mrs. Tigue. Defendant Rexall showed that it sold DES only through its own franchised drugstores and that none of the pharmacies patronized by Mrs. Margolies and Mrs. Tigue was a Rexall franchisee. *See* App. 32a-33a.

challenges to the revival statute were rejected (App. 19a-22a, 42a-43a).

D. *The Decision of the New York Court of Appeals.*

As befits an appeal from denial of summary judgment, the opinion of the court of appeals opens by mentioning that plaintiffs "allege that they were injured" by DES (App. 3a). The opinion goes on, however, to state as established fact that "strong evidence links prenatal DES exposure to later development of serious medical problems" (App. 4a), with no mention of the countervailing evidence or the numerous defendants' verdicts in DES cases. Apparently based on these and other allegations, the opinion describes "the insidious nature" of plaintiffs' injuries and asserts that "many manufacturers, each behind a curtain, contributed to the devastation" (App. 11a), finally describing plaintiffs as "the innocent" and the manufacturers as "the wrongdoers" (*id.*).

Faced with plaintiffs' inability to identify the suppliers allegedly responsible for their injuries, the court of appeals imposed a form of non-identification liability that goes well beyond anything adopted by other courts. The court below simply eliminated the ancient requirement of "causation in a single case" (App. 17a). It imposed this "non-identification" liability on DES producers even though it admitted that there is no "reasonable link between liability and the individual risk created by a defendant to a particular plaintiff" (*id.*). Indeed, the court below recognized that "the chance that a particular producer caused the injury is often very remote" (App. 9a). Instead, the court based liability upon a presumed "risk of injury each defendant created to the public at large" throughout the country by producing DES, with that "risk" to be measured by each defendant's "market share" of DES sold for pregnancy use on an otherwise unspecified "national market" basis (App. 16a-17a).

The court conceded that liability is not "based on . . . causation in a single case" (App. 17a) and that its rule "will likely result in a disproportion between the liability of individual manufacturers and the actual injury each manufac-

turer caused" in New York (App. 16a). Indeed, the court admitted that its rule "cannot be founded upon the belief that, over the run of cases, liability will approximate causation" in New York (App. 16a-17a).

Most strikingly, the court of appeals' logic led it to hold that a defendant is liable for DES injuries notwithstanding that uncontroverted evidence establishes it had no connection with the plaintiff whatsoever ("non-exculpation" liability). In the words of the court below, "there should be no exculpation of a defendant who . . . appears not to have caused a particular plaintiff's injury" (App. 17a). The proven fact that a defendant could not have manufactured the DES actually taken by plaintiff's mother "is merely a windfall . . . to escape liability" (*id.*).

Finally, the court held that the revival statute does not violate due process or equal protection (App. 19a-22a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Violates the Most Fundamental Principles of Adjudicatory Due Process by Allowing Damage Awards Where There Is No "Reasonable Link Between Liability" and the Plaintiff's Alleged Injury, As Well As Where A Defendant Concededly Could Not Have Caused the Plaintiff's Injury.[13]

By denying certiorari in *Sindell* and its progeny, this Court has allowed the lower courts to experiment with various

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13 Although the judgments below remand these cases for further proceedings in the state trial courts, they are "final" for purposes of this Court's appellate jurisdiction. *See* 28 U.S.C. § 1257(a); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-87 (1975). The judgments below finally and conclusively resolve all federal questions presented here. Remand proceedings cannot shed material new light upon, or otherwise alter the posture of, the federal questions. A remand would address state issues only, such as whether DES caused plaintiffs' alleged injuries and whether Squibb was negligent. Further, whatever the disposition might be on remand, there is no doubt that identical federal issues will repeatedly arise in the 800 cases now pending or likely to be filed in New York alone (App. 3a, 6a), in most of which the plaintiffs concede—as they do here—that they cannot identify the

forms of non-identification liability. The result has been a decade of confusion and uncertainty, with no consensus developing.[14] Non-identification liability remains an aberration that, as shown below, raises substantial constitutional questions. The court of appeals' decision, in linking non-identification liability with a rule denying defendants the right to exculpate themselves, raises even more fundamental due process concerns. In light of New York's quantum expansion of non-identification liability, this Court should now set constitutional limits on liability without causation.

Individualized determination of guilt is a uniquely judicial duty that stands at the core of "the Anglo-American legal heritage." *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring). In making individualized responsibility for a plaintiff's injuries irrelevant and expressly barring individual exculpation, the decision below raises substantial constitutional questions as to whether a court—in the guise of common law decisionmaking—has the power to engage in "social engineering" of a distinctly legislative character. *See Mulcahy* 376 N.W.2d at 76.

A state court's development of its common law is, of course, limited by constitutional constraints. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1963); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930). This "Court must examine [the] State's chosen standard to determine whether it satisfies 'the constitutional minimum of

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manufacturer whose product allegedly injured them. Many more cases are pending in other states.

Finally, the decision below renouncing bedrock concepts of causation and personal responsibility—while imposing damage awards even on defendants who concededly did not cause plaintiff any harm—threatens core federal constitutional policies governing irrebuttable and irrational presumptions, adjudicative due process and arbitrary action by the states. *See Cox Broadcasting*, 420 U.S. at 483.

14 *See* pp. 5-7 & nn. 4-6 above. One result is a crazy-quilt of potential liability that makes it impossible to insure rationally against the almost inevitable dangers of pharmaceutical innovation. It also unfairly penalizes

"fundamental fairness'." *Santosky v. Kramer*, 455 U.S. 745, 756 n.8 (1982) (citations omitted).

The requirement that a plaintiff prove that the named defendant was the person who wronged the plaintiff is a fundamental tenet of our legal system.[15] *See, e.g., In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 822 (E.D.N.Y. 1984) ("fundamental principle[ ] . . . that a defendant should not be held responsible for harm he did not cause"); *Mulcahy*, 386 N.W.2d at 76; ("fundamental negligence requirement of proving causation"); *Zafft*, 676 S.W.2d at 247 ("so fundamental a concept of tort law"); *Morton*, 538 F. Supp. at 599-600 ("fundamental requirement of causation"); *Namm*, 427 A.2d at 1125 ("fundamental principle"); *Gray*, 445 F. Supp. at 338 (same); *Tidler v. Eli Lilly & Co.*, 95 F.R.D. 332, 334 (D.D.C. 1982), *aff'd*, 851 F.2d 418 (D.C. Cir. 1988) ("market share theory of liability . . . represents a radical departure"); *Mizell*, 526 F. Supp. at 596 (same); *Bateman v. Johns-Manville Sales Corp.*, 781 F.2d 1132, 1133 (5th Cir. 1986) (characterizing market share liability as "radical expansion"); *Senn*, 751 P.2d at 223 (market share "alternative liability requires a profound change in fundamental tort principles of causation").

Under our civil justice system, a plaintiff cannot recover for "negligence in the air", *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 341, 162 N.E. 99 (1928); *see Mulcahy*, 386 N.W.2d at 76, and thus it is necessary to prove both that the defendant did something wrong and that it was done to the

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national firms with long histories in the industry, since they are the obvious targets of litigation, while defunct competitors will never have to pay the alleged costs of their negligence.

15 *Cf. Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982) (citations omitted):

> "Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action.'"

plaintiff before the court. Proof of either element alone is not sufficient. *Cf. Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 13, 35 (1976) (district court invalidated Black Lung Benefits Act provision on ground that it precluded defense that plaintiff's injury "did not arise out of employment in the particular mines for which [a defendant] was responsible"). The "law does not guarantee relief to every deserving plaintiff." *See Zafft*, 676 S.W.2d at 246; *Bateman*, 781 F.2d at 1133-34 (refusing to adopt market share liability although plaintiff had no other remedy); *Clift v. Nelson*, 25 Wash. App. 607, 608 P.2d 647 (1980) (assault action by police officer struck from behind in mob confrontation dismissed for failure to prove which defendant hit plaintiff).

The rule adopted by the court below amounts in practical effect to a selective tax or social insurance scheme. *See Blackston*, 764 F.2d at 1483 ("elimination of a causation requirement would render every manufacturer an insurer not only of its own products, but also of all generically similar products manufactured by its competitors"). It "is not merely an extension of established legal principles, but an action of wholesale judicial legislation." *See Tidler*, 851 F.2d at 422 (citation omitted); *see also Ryan*, 514 F. Supp. at 1018 (describing *Sindell* as "unprecedented legislation"). By the very nature of the judical process, a court's ability to make legislative type decisions is sharply limited by its narrow focus on the parties before it and the arguments and facts they choose to present, the restrictions on its ability to gather information, and judges' lack of power to levy taxes. In light of these inherent limitations, this Court should consider whether due process permits a state court to perform core legislative functions.

At bottom, this Court must consider whether the decision below ignores the profound distinction between the quantum of proof necessary to meet due process requirements in the fundamentally different contexts of legislative regulation and judicial factfinding. When government seeks to protect its citizens through a prospective administrative or legislative ban on possibly toxic substances, the action may be upheld "even though the probability of harm to any individual

is small . . . the studies necessary to assess risk are incomplete" and there is "a very low probability of any causal relationship." *Agent Orange*, 597 F. Supp. at 781, 785. Where, however, individuals invoke tort law to seek retrospective "compensation for injuries after the fact," *id.* at 781, evidence that might be adequate to justify a prospective regulatory ban "would not be sufficient to find an individual defendant liable to an individual plaintiff." *Id.* at 782. This is because "the law believes it unfair to require an individual to pay for another's tragedy unless it is shown that it is more likely than not that he caused it." *Id.* at 781.

A. *Violation of Constitutional Burden of Proof Requirements.*

The decision below presents the important question whether due process allows a state court to take a defendant's property where the plaintiff cannot prove by a fair preponderance of the evidence that the defendant caused her alleged injury. *See Tidler*, 95 F.R.D. at 334 n.5 (noting due process issue).

This Court has repeatedly recognized that "[t]he function of a standard of proof" under the Due Process Clause "is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions.'" *Addington v. Texas*, 441 U.S. 418, 423 (1979), quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard of proof "serves to allocate the risk of error between the litigants" and reflects a societal judgment as to "the relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423.

Of particular relevance here, the Court has recognized that "while private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.' [*Addington*,] 441 U.S., at 423." *Santosky*, 455 U.S. at 755. "Any other standard expresses a

preference for one side's interests." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). This Court has never even suggested that private property may be taken in a damage award upon proof of anything less than a "fair preponderance of the evidence." When the standard of proof is changed, it is invariably done to protect defendants, *see, e.g. Addington*; *Santosky* ("clear and convincing evidence" required to deprive individuals of certain personal liberties), so as not to disadvantage them by "express[ing] a preference for [plaintiff's] interests." *See Herman & MacLean*, 459 U.S. at 390.

Where private parties have a "relatively equal . . . interest in the outcome . . . it is appropriate that each share roughly equally in the risk of an inaccurate factual determination." *Rivera v. Minnich*, 483 U.S. 574, 581 n.8 (1987). The decision below, however, would judicially deprive Squibb of property where there is no "reasonable link between liability and the risk created" (App. 17a), and where the likelihood is admittedly "very remote" that Squibb injured the plaintiff (App. 9a).

The case thus presents the question whether, under the Due Process Clause, a state court may decide that a particular group of plaintiffs—"the innocent," according to the court of appeals (App. 11a)—is so much more deserving than a particular group of defendants—arbitrarily characterized as "wrongdoers" (*id.*)—that even substantial doubt as to a required element of the tort must be resolved in plaintiffs' favor. This Court has suggested that "in a civil dispute over money damages," *Santosky*, 455 U.S. at 755, such a judicial thumb on the scales of justice is inappropriate because "the State's legitimate interest is in the fair and impartial adjudication of all civil disputes." *Rivera*, 483 U.S. at 581 n.8. Even where "the interests of plaintiffs in such suits are significant"—as where, for example, plaintiffs are "among the very individuals Congress sought to protect"—they "should recover" only "[i]f they prove that it is more likely than not" that the defendant injured them. *Herman & MacLean*, 459 U.S. at 390.

The reason is clear: "the Constitution expressly protects against confiscation of private property." *Lindsey v. Normet*,

405 U.S. 56, 74 (1972). If that Fourteenth Amendment right is to have any substance, it must mean that a person challenging an owner's right to his property must show some greater entitlement to the property than the owner. In other words, property cannot be taken where, as here, the challenger's claim to it is "very remote" (App. 9a) and the court "concedes the lack of a logical link" (App. 18a n.3) between the owner and the challenger.

The New York rule is not justified by the court of appeals' claim that it "apportion[s] liability so as to correspond to the overall culpability of each defendant," measured by each DES producer's "market share" of an undefined "national market" (App. 16a-17a). Our legal system simply does not function that way. As an illustration, consider a pedestrian killed by a speeding hit-and-run driver. Assume that a police video camera a few hundred yards away records 100 cars speeding on the stretch of a highway during the hour in which the victim was struck. No one would seriously contend that the victim's estate could sue all 100 drivers and recover 1% of its damages from each one of them. Having failed to identify the specific wrongdoer, the estate could recover nothing in court.[16]

B. *Non-Identification Liability Creates an Irrebuttable Presumption.*

The decision below also raises the important question whether an unconstitutional irrebuttable presumption is created by allowing non-identification liability with no oppor-

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16 The only widely-accepted circumstance in which courts in this country have allowed recovery against all members of a group in which only one member could have injured the plaintiff is under the so-called "alternative liability" theory of § 433B(3) of the Restatement (Second) of Torts (1965). Under that theory, where two or more defendants act tortiously but there is uncertainty as to which of them caused plaintiff's injury, the burden is shifted to each defendant to prove that he did not cause the harm. *See, e.g., Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948) (two defendant hunters fired negligently in direction of plaintiff, who was injured by a single bullet). *But see Senn* (rejecting alternative liability). Assuming that alternative liability

tunity for exculpation. Under the New York rule, it is conclusively presumed that because Squibb produced *any* DES, it is responsible for producing the DES that was taken by *every* plaintiff's mother. The court of appeals effectively conceded the irrationality of this presumption when it acknowledged the "lack of a logical link between liability and causation in a single case" (App. 18a n.3). Although all non-identification liability imposes an irrebuttable presumption, the problem is most starkly posed by the "non-exculpation" rule, which conclusively presumes that the plaintiff was injured by a manufacturer that proves it did not produce the allegedly offending DES.

"[P]ermanent irrebutable presumptions have long been disfavored under the Due Process Clause." *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). A "presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the

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comports with due process, it still does not answer the serious constitutional questions raised by New York's DES liability scheme.

Under the alternative liability theory, the plaintiff must still meet the due process requirement of proving causation. "It must be more probable than not that an injury was caused . . . by some one of the named defendant manufacturers." *Hall v. E. I. DuPont de Nemours & Co.*, 345 F. Supp. 353, 379 (E.D.N.Y. 1972). An alternative liability claim will fail where the plaintiff does not sue enough defendants to meet that standard of causation—that is, where the injury may well have been caused by an actor not named as a defendant. *See id.* at 359, 379 (defendants included all U.S. manufacturers of allegedly dangerous product and their trade association); *Agent Orange*, 597 F. Supp. at 827 (all producers of alleged toxic chemical were defendants). As the court below recognized in rejecting the alternative liability approach here, its "fairness disappears with the decreasing probability that any one of the defendants actually caused the injury" (App. 9a). Presumably out of similar concerns, other courts in DES cases have required plaintiffs to join as defendants all DES producers, *Abel*, 343 N.W.2d at 174; or at least the producers of a "substantial share" of DES. *Sindell*, 607 P.2d at 937.

New York, however, has imposed no such requirement. It allows cases to proceed even against a single manufacturer. Notably in the instant cases, the total of all defendants' market shares is less than 50% (as would be expected in a market of some 200-300 firms). In such factual circumstances, a finding that the "injury was caused . . . by some one of the named defendant manufacturers," *Hall*, 345 F. Supp. at 379, would be pure speculation.

presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969). *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 28 (presumption standards in civil law context).

In the instant cases, no such "substantial assurance" is possible. Indeed, the opposite is true. No DES producer had a majority share of DES sales in the 1950's and 60's, while Squibb's share was about 5-10%. Thus, "a significant percentage," *Leary*, 395 at 46, or a "not inconsiderable proportion," *id.* at 52, of DES—indeed about 90% of DES—was not supplied by Squibb. Accordingly, as a matter of simple mathematics, the only statement that can be made with "substantial assurance" here is that "the presumed fact" that a plaintiff was exposed to DES made by Squibb is *not* "likely . . . to flow from the proved fact" that Squibb manufactured DES. *See Leary*, 395 U.S. at 36. .

An important constitutional question is thus posed by whether New York's DES rule violates the Due Process Clause because it "'operates to deny a fair opportunity to rebut it.'" *Vlandis*, 412 U.S. at 446, quoting *Heiner v. Donnan*, 285 U.S. 312, 329 (1932). It "constitutes an attempt, by [judicial] fiat, to enact into existence a fact which here does not, and cannot be made to exist in actuality," *see Heiner*, 285 U.S. at 329—namely, that Squibb's product injured every plaintiff in some proportion related to its market share. Moreover, because New York lacks the constitutional power to "deny[ ] a litigant the right to prove the facts of its case," it cannot "escape from constitutional restrictions" by doing the same thing "in the guise of a rule of substantative law." *Id.*

C. *The Decision Below Amounts to Impermissible Judicial Legislation.*

Under New York's DES rule, all producers are liable for their "market share" of all tort damages allegedly caused by DES, without regard to their connection to a particular plaintiff's injuries. This taking of defendants' property—without proof of individual responsibility for the plaintiff's

injuries—is functionally identical to the imposition of a retroactive tax or social insurance compensation scheme upon all DES producers. *See* p. 14 above. Such retroactive compensation regimes raise serious due process questions, even when imposed by Congressional enactment. *See, e.g., Turner*, 428 U.S. at 16-20.

Yet here, the court of appeals has adopted a system of virtually unlimited victim compensation, based only upon the narrow factual record of a summary judgment motion. In light of the inherent limitations of judicial proceedings (*see* p. 14 above) and the fact that all the conditions allegedly caused by DES also occur absent DES exposure (*see* p. 5 above), the rational basis for the court of appeals' DES rule is open to serious question. *See, e.g., Turner*, 428 U.S. at 17-18 ("we would . . . hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness") (citations omitted), 25 ("[t]he damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a 'cost' of the operator's business" which it is rational to charge to the employer); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

The court of appeals' claim that it was merely fulfilling "expectations" that "the legislature consciously created . . . by reviving hundreds of DES cases" (App. 11a) is demonstrably inaccurate. The revival statute was part of a tort reform act passed only after extensive debate over the course of several legislative sessions. As one of its Senate sponsors said just before final passage: "[W]e are changing a statute of limitations here. We are changing a procedural measure. *We are not changing substantive right[s], certainly not retrospectively.*"[17] Thus, the court below simply ignored the express limitations imposed by the democratic branch of government and

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17 Statement of Sen. Connor, 1986 Record of Proceedings, N.Y. Senate at 5152-53; emphasis added). The revival bill's lead Senate sponsor explained:

> "I would emphasize . . . as I have said over and over again, this legislation . . . does not automatically have someone be paid a claim.

enacted its own political predilections into law. A serious question is raised by whether appointed judges, whose function is to adjudicate individual cases, may impose such a scheme.

II. The New York "Revival" Statute Irrationally Singles Out Claims Against DES Manufacturers and Arbitrarily Divests Their Right of Repose Under the Statute of Limitations.

New York's 1986 revival statute (*see* p. 2 above) allowed plaintiffs to file claims—otherwise long barred by the statute of limitations—involving five enumerated substances during the one-year period ending July 30, 1987. The revival statute was justified as an adjunct to a general change in the time from which the limitations period for alleged latent toxic tort injuries runs in New York. Under the new law, the date of discovery of the injury controls, rather than the date of exposure (*see* p. 7 n. 10 above). The claims that were "revived," however, were not limited to those that plaintiffs could not have discovered during the old limitations period. Rather, the statute also allowed suits by plaintiffs who knew of their claims years before the statute had run, but had voluntarily elected not to sue, as well as claims that were otherwise barred by actual judgments on statute of limitations grounds.

In rejecting Squibb's due process challenge to the revival statute, the court of appeals relied primarily upon this Court's decision in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), which held that statutes of limitations are "procedural" and that rights under them exist "only by legislative grace." *Id.* at 314. An important constitutional question is presented by whether the analysis and result of *Chase*—which was based on the outmoded right-privilege distinction—survives this Court's modern redefinition of constitutionally-

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> They . . . have to have their day in court and they have to prove their case. By no means are people automatically going to be paid."

Statement of Sen. Stafford, *id.* at 5147.

protected property rights.[18] The need for review is highlighted by the fact that two state supreme courts have invalidated revival statutes similar to New York's, *see Celotex Corp. v. St. Joseph Hospital*, 259 Ga. 108, 376 S.E.2d 880 (1989); *Tyson v. Johns-Manville Sales Corp.*, 399 So.2d 263 (Ala. 1981), albeit on state constitutional grounds. Those courts' use of state constitutional provisions is further indication that the continuing usefulness of the *Chase* approach is questionable.

Modern due process analysis defines constitutionally-protected property interests "by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The purpose of the analysis is "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.* Similarly, modern just compensation analysis identifies protected property by looking to whether state regulation "has interfered with distinct investment-backed expectations." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Statutes of limitations give rise to precisely the sort of reliance interests and "investment-backed expectations" that due process protects. As Justices Bradley and Harlan recognized over a century ago:

> "The immunity from suit which arises by operation of the Statute of Limitations is as valuable a right as the right to bring the suit itself. . . . Statutes of limitation are not only calculated for the repose and peace of society, but to provide against the evils that arise from loss of evidence and the failing memory of witnesses. . . . [I]t is

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18 In addition, even under the outmoded *Chase* analysis, it is not clear that the revival statute is merely "procedural." A truly procedural statute of limitations applies on a general basis to all cases in broad categories. Here, however, by singling out DES and four other substances, while ignoring the many other substances legislatively recognized to produce possible latent injuries (*see* pp. 23-24 below), the revival statute in fact makes substantive distinctions that cannot be rationally justified.

> . . . a right, . . . when vested, . . . as much to be protected as any other right that a man has."

Campbell v. Holt, 115 U.S. 620, 631 (1885) (Bradley, J., dissenting). *See also Tyson*, 399 So.2d at 269 ("the great preponderance of authority favors the view that . . . after a cause of action has become barred by the statute of limitations, the defendant has a vested right . . . or property which cannot be taken away by legislation"). New York recognizes that statutes of limitations confer on defendants the right of repose and the legitimate expectation to be free from stale claims. *See, e.g., Parker v. Port Authority*, 113 A.D.2d 763, 493 N.Y.S.2d 355, 357 (2d Dep't 1985) ("primary purpose of Statutes of Limitation is to relieve defendants of the necessity of investigating and preparing a defense," citing *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944)).

In the instant case, the revival statute directly impinges upon investment-backed expectations that arose by virtue of the former statute of limitations. Freed from potential liability by the expiration of the limitations period, a manufacturer tailors its business decisions accordingly. In DES cases, revival prejudices defendants by the very mischief that rights of repose are intended to prevent: "evidence has been lost, memories have faded, and witnesses have disappeared." *See Railroad Telegraphers*, 321 U.S. at 349. The deprivation is particularly acute where defendants relied on actual judgments of dismissal, which are effectively vacated by the revival statute.

A substantial question is also raised as to whether New York's revival of stale DES claims is irrational and arbitrary, thereby denying petitioner both due process and equal protection. The rationale for revival is to give a day in court to plaintiffs who could not reasonably have discovered their claims earlier. But revival of claims of which the plaintiffs were aware during the former limitations period is inconsistent with that rationale. Such inconsistency between a statutory provision and the general justification for the law

raises serious constitutional questions. *See, e.g., Moreno*, 413 U.S. at 533-34.

Moreover, although it was asserted in enacting the revival statute that it covered "all of the currently known categories of victims of exposure to toxic or harmful substances," *see* 1986 N.Y. Legis. Ann. at 288, that claim is demonstrably inaccurate. For example, the New York Workers Compensation Law specifically lists at least a dozen additional substances that may cause latent injury. *See* N.Y. Work. Comp. L. § 28 (McKinney Supp. 1989). Similarly, New York's prospective change in 1986 to a discovery-based limitations period applied to all substances that may cause latent injury. *See* p. 7 n. 10 above.

In these circumstances, a substantial question is presented by whether it is irrational to single out DES for revival of claims when other substances that the legislature believed to be potentially as or more likely to cause alleged latent injuries are not subject to the same treatment. The legislative history contains no rational justification for the distinction; it appears simply to have been a matter of political expediency. Although, as the court of appeals noted (App. 22a), the legislature may address a problem one step at a time, any line that is drawn must be constitutionally acceptable. An important constitutional question exists as to whether the revival statute meets the applicable due process and equal protection standards.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

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Respectfully submitted,

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